

1 CCIBUSTC Conference

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

-----x

4 STEVEN MEYER, MARC BELL, LARRY
5 MULLIGAN-GIBBS and AIMEE
6 JOHNSON, on behalf of
themselves and all others
similarly situated,

7 Plaintiffs,

8 v.

11 Cv. 6268 (ALC)

9 UNITED STATES TENNIS
10 ASSOCIATION,

Defendant.

11 -----x

12 New York, N.Y.
13 December 18, 2012
3:03 p.m.

14 Before:

15 HON. MICHAEL H. DOLINGER,

16 Magistrate Judge

17 APPEARANCES

18 ABBEY SPANIER RODD & ABRAMS, LLP
Attorneys for Plaintiffs
19 ORIN KURTZ

20 AKIN GUMP STRAUSS HAUSER & FELD LLP
Attorneys for Defendant
21 NATHAN J. OLESON

1 (In open court)

2 THE COURT: Okay. What's going on in this case?

3 MR. KURTZ: Good afternoon, your Honor. Orin Kurtz
4 for the plaintiffs. We're here on the premotion conference for
5 a requested motion to compel. The plaintiffs in this case
6 allege that-- the plaintiffs in this case are umpires working
7 at the U.S. Open Tennis tournaments. They allege that they
8 have been misclassified as independent contractors and, along
9 with that, denied overtime pay under the Fair Labor Standards
10 Act and New York law.

11 The U.S.T.A. has requested to make a motion for
12 summary judgment, and one of the arguments that it has made is
13 that even if the umpires are properly classified as
14 independent-- as employees, then they're exempt from the
15 coverage of the Fair Labor Standards Act and New York law based
16 on an exemption that I'll call the seasonal exemption. And
17 that's 29 U.S.C. 213(a)(3).

18 The relevant part of that exemption to what we're here
19 today is that the U.S.T.A. must show that it is a recreational
20 organization and it must show that its receipts for any six
21 months of the year are less than 33 percent of the receipts for
22 the other six months of the year.

23 We have requested documents about that exemption.
24 Courts have unanimously held that it's construed narrowly
25 against the employer and that an employee should only be

1 exempted if clearly and unmistakably within the purview of the
2 exemption.

3 So we've requested documents about that exemption and
4 have propounded interrogatories. The main issue that our
5 documents are directed towards is whether the U.S.T.A. is a
6 recreational organization within the meaning of the statute.

7 THE COURT: What is a recreational organization?

8 MR. KURTZ: Well, it's an organization whose purpose
9 is to provide recreation and whose activities are about
10 recreation. The CFR says that a typical --

11 THE COURT: Recreation by whom? By the public
12 generally or by some specified subset of the public?

13 MR. KURTZ: It's the public. There have been cases
14 debating whether it has to be open to the public. As a general
15 matter, it's to the public.

16 The Code of Federal Regulations has said that a
17 typical recreational organization is a concessionnaire at an
18 amusement park. In our contention, a small organization. And
19 the Courts have held that the statute was enacted, the
20 exemption, to allow these small organizations to operate
21 without having to pay the relatively high wages of a Fair Labor
22 Standards Act because they're only going part of the year.

23 THE COURT: Have there been determinations made by
24 courts or otherwise as to whether the term "recreational
25 organization" encompasses the provision of sporting or other

1 amusements to be observed by the public at large?

2 MR. KURTZ: There have been decisions about that, yes.
3 There have been cases where the parties are disputing whether
4 the employees are covered under this exemption. And the
5 defendant was-- there was the Sarasota White Sox were once a
6 defendant, which is a Minor League Baseball team. There are --

7 THE COURT: What outcome?

8 MR. KURTZ: What outcome? In that case the Court held
9 that the employer was a recreational establishment.

10 There was also a case called *Bridewell v. Cincinnati*
11 *Reds*. There the Reds were not held to be within the exemption.
12 The arguments, I believe, were not exactly on point with what
13 we're discussing here, but there were cases like that.

14 THE COURT: Okay.

15 MR. KURTZ: So our document requests-- and there's a
16 case called *Chow*-- I'll have to pull it up, but there's a case
17 that we cited in our opening and reply letter.

18 THE COURT: *Chow v. WJJ Resort Ranges*, a Sixth Circuit
19 case.

20 MR. KURTZ: Yes. That case, and along with a case
21 cited by the defendants here, expressly looked at the purpose
22 of the organization to determine whether it was a recreational
23 organization.

24 We have requested documents here asking about the
25 U.S.T.A.'s purpose. We have some indication that the U.S.T.A.

1 is designed not for recreation, but, as it states in its tax
2 returns and on its website, that its submission is to promote
3 and develop the sport of tennis.

4 THE COURT: Why is that necessarily inconsistent with
5 recreation? Again, depending upon on what recreation means, it
6 seems to me the distinction arguably can be drawn between
7 participating in an activity, like softball, baseball or
8 tennis, or sitting on a bench watching someone else doing it.

9 Now, one of them or the other of them or both of them
10 might be recreational within the meaning of this term, but I'm
11 not clear from what you're saying whether both of them are. If
12 the latter, that is sitting and observing someone else engaging
13 in profitable recreation, such as professional tennis, is not
14 in itself recreation, then I don't know that there would be any
15 dispute in this case, I mean a genuine dispute, because
16 presumably U.S.T.A. operates in such a way that it sells
17 tickets to a sporting event that either is either within the
18 definition of recreational or it's not, I would think.

19 And that's apart from the question of whether the
20 receipts for six months are greater than 33 percent of the
21 total receipts for the year, which I suppose is a pure
22 financial issue which would be in financial documents. But I'm
23 not sure what it is you're proposing in terms of disputed
24 document production that would speak to whether what the
25 U.S.T.A. does, which I take it is not a secret, whether that

1 constitutes a recreational organization or not.

2 MR. KURTZ: Well, that's why we requested the
3 documents we have, which is to show that the U.S.T.A.'s purpose
4 is not recreation, but the promotion of a sport. And we've
5 requested-- the U.S.T.A.'s certificate of incorporation or
6 bylaws sets out that there will be a board of directors to
7 implement the U.S.T.A.'s policies and objectives.

8 THE COURT: Is there a dispute about whether you can
9 get the bylaws?

10 MR. KURTZ: No, the bylaws are publicly available and
11 we have them.

12 THE COURT: Okay.

13 MR. KURTZ: But we've requested the contracts with the
14 board of directors, which I understand there may not be, but
15 there are also two people who are executive directors and I
16 understand that the U.S.T.A. is contending that they are not
17 directors. Our position is that our request for director
18 contracts would encompass the executive director as well.

19 THE COURT: And the relevant-- has that been objected
20 to?

21 MR. KURTZ: Yes.

22 THE COURT: Okay. On what grounds? Relevance?

23 MR. KURTZ: Relevance. I think they were pretty form
24 objections: Relevance, overbroad.

25 THE COURT: The usual suspects.

1 MR. KURTZ: The usual suspects.

2 THE COURT: On the question of relevance, what is the
3 relevance of a contract that U.S.T.A. has with either an
4 executive director or any other particular director?

5 MR. KURTZ: Well, the U.S.T.A. is paying these people
6 between a million dollars one year, nine million dollars one
7 year.

8 THE COURT: I'm in the wrong profession.

9 MR. KURTZ: We want to know why the U.S.T.A. is paying
10 them. Why are they hired by the U.S.T.A. to do the work?
11 What's the-- what's the --

12 THE COURT: Someone's got to run an organization. I'm
13 not sure I follow what the relevance of that is to whether it's
14 a recreational organization or not.

15 MR. KURTZ: Well, we want to know what's the work that
16 they're hired to do? If the work that they're hired to do is
17 go out and teach tennis, that would be one thing. But if
18 they're hired to raise a lot of money, that might be an
19 entirely different story. This is an organization that takes
20 in \$200 million a year and issues bond offerings and has a very
21 large financial footprint, and we would like to know what are
22 the workings behind that and what is the underlying reason for
23 all of it.

24 THE COURT: The underlying reason for what?

25 MR. KURTZ: Well, what is the underlying reason that

1 these executive directors are being paid what they do? What
2 goal of the U.S.T.A. are they furthering to get that money?

3 THE COURT: Well, let me ask you this: Is it clear
4 whether an organization whose purpose is to draw in people --
5 and presumably to fill its coffers -- by inducing them to watch
6 a sporting event, whether that's a recreational organization or
7 not?

8 MR. KURTZ: There hasn't been-- there's not a lot of
9 case law out there on this, and I haven't seen a decision that
10 really looked at that question and said is it-- you know, that
11 really dissected the --

12 THE COURT: Is that really going to be the issue here
13 or is there some other set of issues that are lurking in the
14 shadows, so to speak?

15 MR. KURTZ: There's no issue that I know of in the
16 shadows. It's really we want to see the workings of this.

17 THE COURT: I'm not asking about what you want to see.
18 I'm trying to get a definition of what the dispositive issue is
19 for determining whether U.S.T.A. is a recreational organization
20 within the meaning of the statute.

21 Am I correct in surmising from what you've said that
22 the determinative issue, since there's no dispute really that
23 the U.S.T.A. holds a tournament, or multiple tournaments for
24 that matter, to which the public is invited to come at the
25 price of buying a ticket to observe athletes participating in a

1 given sport, to attend, whether that type of function by an
2 organization makes it a recreational organization? Is that the
3 question that's going to determine at least whether they have a
4 shot at getting this exemption?

5 MR. KURTZ: That's one of the questions, yes.

6 THE COURT: What are the other questions apart from
7 the 33 percent financial issue?

8 MR. KURTZ: Well, okay. Yes, that is the question.
9 That is the question and we'll --

10 THE COURT: That's a pure legal question, isn't it,
11 really, if there's not a particular dispute about what the
12 U.S.T.A. does?

13 MR. KURTZ: Well, we don't know exactly what the
14 U.S.T.A. does at this point. I mean, we know that it --

15 THE COURT: You know it holds tournaments.

16 MR. KURTZ: We know it holds tournaments.

17 THE COURT: What other areas do you suspect it may be
18 engaged in?

19 MR. KURTZ: Well, we know that it has seven hundred
20 thousand members and it takes in a lot of dues from them. In
21 connection with its tournaments, it procures a lot of corporate
22 sponsorship. It's involved in tennis throughout the world and
23 throughout the U.S. paying millions and millions of dollars to
24 athletes.

25 THE COURT: Okay. So you want the contracts with

1 these executive directors?

2 MR. KURTZ: Right.

3 THE COURT: Okay. What else?

4 MR. KURTZ: We wanted the minutes of the board of
5 directors meetings and of the meeting of the past presidents of
6 the United States Tennis Association.

7 THE COURT: I'm sorry, you want the minutes of the
8 board of directors meetings.

9 MR. KURTZ: Yes.

10 THE COURT: Which I take it you would say might
11 reflect the institutional purpose and function of the U.S.T.A.

12 MR. KURTZ: Yes.

13 THE COURT: What is this about past presidents? What
14 is it you are seeking?

15 MR. KURTZ: Well, there's a meeting-- there's meetings
16 that are held by the past presidents of the U.S.T.A. It's our
17 understanding that financial matters are discussed at these
18 meetings. They're open to the public. One or more of our
19 plaintiffs has been to them.

20 THE COURT: These are like annual meetings?

21 MR. KURTZ: Yes, I believe they are.

22 THE COURT: Okay.

23 MR. KURTZ: We have also asked for the U.S.T.A.'s
24 applications for not-for-profit status. In order to apply for
25 not-for-profit status under IRS Code 501(c), a company has to

1 state its purpose. There is an exemption under that statute
2 under 501(c)(7) that allows recreational organizations to claim
3 tax-exempt status. The U.S.T.A. has chosen a different
4 exemption for business needs, boards of trade, real estate
5 boards.

6 And so we're interested-- although the U.S.T.A. states
7 on its tax returns what its purpose is, we would like to see
8 what is also stated in those applications.

9 THE COURT: You've seen their tax returns?

10 MR. KURTZ: We have.

11 THE COURT: Okay.

12 MR. KURTZ: There's also a line of-- there's also some
13 case law out there looking at the idea that because this
14 statute-- because this exemption was enacted to allow the small
15 companies who operate on a seasonal basis to pay their
16 employees wages without the Fair Labor Standards Act's high
17 requirements, that some organizations may not be of the type
18 that's intended to fit within this statute. And it's our
19 contention here that that's what the U.S.T.A. is going to fall
20 under. And we've requested --

21 THE COURT: I'm sorry. When you say "that" is what
22 the U.S.T.A. is going to fall under, what is the "that" that
23 you're referring to? Obviously you're not saying they're going
24 to fall into an exemption, but I'm not sure what you're saying
25 they are going to fall into.

1 MR. KURTZ: It's out contention that they are not the
2 type of organization that was designed to fall under this
3 exemption. They are not the mom-and-pop shop operating as a
4 concessionnaire on a boardwalk. They're a large organization
5 that takes in a lot of money and --

6 THE COURT: Is there anything in the regulations or
7 the statute that puts a cap on revenue or is the only thing
8 that you see in the regulations is the 33 percent rule?

9 MR. KURTZ: I have not seen any language saying
10 there's a cap on revenue.

11 THE COURT: Have you seen any case law or agency
12 rulings that would suggest a mom-and-pop limitation on the
13 exemption?

14 MR. KURTZ: With those exact words? No.

15 THE COURT: In sum and substance, if not in those
16 exact words.

17 MR. KURTZ: Well, it's the idea that the federal
18 regulations expressly state that the type of organization that
19 is typical under this exemption is one that is a
20 concessionnaire. And that's 29 CFR 779.385. It says "Typical
21 examples of recreational"-- in brackets, that's our quote --
22 "of [recreational organizations]" -- out of the brackets --
23 "are the concessionnaires at amusement parks and beaches."

24 To me there's a -- I suppose a concessionnaire could
25 take in \$200 million in a summer, but to me there's a size

1 limitation in there. There's something saying this is really
2 designed to protect the small company, not the company like
3 this.

4 THE COURT: By the way, has there ever been any ruling
5 either through an agency action or through litigation in other
6 sports that would pose the same issue? For example, Major
7 League Baseball I guess employs umpires. Has there been a
8 ruling as to whether Major League Baseball is or isn't exempt
9 as a recreational organization? Or other sports. You could
10 name plenty of them, I'm sure.

11 MR. KURTZ: I've seen a case with the-- it was a
12 basketball team in Louisiana. And there the issue-- the first
13 name of the case was *Liger*, L-i-g-e-r. I don't recall the rest
14 of it. There the issue was a different issue than what we
15 have, but the Court did seem to entertain that this company
16 was-- that this basketball team was not exempt.

17 I don't have the exact holding with me right now, but
18 there was an argument over how to look at the receipts part of
19 the statute. But if the company was exempt, there would be no
20 need to look at the receipts.

21 THE COURT: Okay. So you are now referring to, I
22 guess, some form of request, be it interrogatories or document
23 requests, that are intended to test whether the U.S.T.A. is
24 prototypical within the universe, or within the universe of
25 this particular exemption.

1 What specifically are you referring to?

2 MR. KURTZ: That's right. Well, we are aware that the
3 U.S.T.A. does pay some of its employees overtime. We're
4 looking to see how many employees, who they pay, what their pay
5 is. If this exemption were available to the U.S.T.A., we're
6 not really sure why the U.S.T.A. wouldn't take it in all
7 instances. So we had an interrogatory that asked to-- that
8 asked the U.S.T.A. to identify which employees they pay
9 overtime and to provide the payroll information for those
10 employees.

11 The U.S.T.A.'s response was we pay certain employees
12 overtime. Our contention is that's evasive and it's answering
13 half of the question. We do pay certain employees, but we want
14 to know who and how and what and how much.

15 THE COURT: Do I have a copy of your interrogatories?
16 I don't -- quickly leafing through here -- see them and I don't
17 get the impression that your letter application quotes the
18 interrogatory. Perhaps it would be helpful if you at least
19 read what the interrogatory asked for.

20 MR. KURTZ: Sure.

21 THE COURT: I should observe parenthetically that the
22 rules of this Court require that any application for relief
23 under Rule 37 include copies of both the request for discovery
24 and the responses. That's just to help the Court quickly
25 analyze whether, textually speaking, the request is proper and

1 is being responded to in a responsive way.

2 MR. KURTZ: Thank you, your Honor. Next time if that
3 comes up, I will change that.

4 This interrogatory requests whether the U.S.T.A.-- I
5 don't know if I have the exact text with me here, but it
6 requested --

7 THE COURT: Does anyone?

8 MR. KURTZ: I'm sorry?

9 THE COURT: Does anyone have it?

10 MR. OLESON: I'm sorry, your Honor, I was supposed to
11 go back to D.C. before I came here, but today I got rescheduled
12 to come here straight from Dallas so I don't have the folder
13 with me.

14 THE COURT: Okay. So we have a somewhat mysterious
15 interrogatory that the plaintiff says has not been responsively
16 answered. And I take it you're saying that the interrogatory
17 asked for the names of all employees who were paid overtime
18 since, according to your letter, January 1, 2005, and to
19 provide all the data.

20 MR. KURTZ: Yes, your Honor, the names and the
21 payroll.

22 THE COURT: Okay. And the entirety of the response
23 that you got is that certain employees, unspecified, were paid
24 overtime, period.

25 MR. KURTZ: That's right.

1 THE COURT: Okay. What else?

2 MR. KURTZ: If that is the-- if that request is
3 granted, then that's all we would need on that subject.

4 THE COURT: Any other issues?

5 MR. KURTZ: I believe not. There's an additional
6 document request, but we've begun discussions on how to resolve
7 that on our own that I think we could...

8 THE COURT: Okay. By the way, what is the current
9 schedule for completion of discovery in this case?

10 MR. KURTZ: Discovery with-- discovery, aside from
11 this, is complete for the named plaintiffs and class
12 certification. We haven't gotten into class merits discovery.

13 THE COURT: Is there a schedule for a class cert
14 motion?

15 MR. KURTZ: That motion is totally briefed.

16 THE COURT: Oh, okay. So that's before Judge Carter?

17 MR. KURTZ: Yes.

18 THE COURT: Okay. Anything else?

19 MR. KURTZ: That's it for now, your Honor.

20 THE COURT: Okay.

21 MR. OLESON: Thank you, your Honor. Nathan Oleson of
22 Akin, Gump, Strauss, Hauer & Feld for defendant U.S.T.A.

23 I'll take the last point first. One other scheduling
24 issue. We do have a-- we had made a request in May to file a
25 motion for summary judgment. That request has been deferred

1 pending the completion of this discovery. And based on the
2 last status conference that we had with Judge Carter, our
3 understanding was he was waiting for this to be completed and
4 potentially waiting for in limine motions for class
5 certification pending resolution of this and the filing of
6 summary judgment motion.

7 I wanted to just step back real quick and clarify some
8 points on the law. First of all, is the statute itself. As
9 Mr. Kurtz has noted, there are just really two requirements to
10 the statute: One is the receipts test, whether two-thirds of
11 your receipts came in in a six-month period; the second part
12 is -- Mr. Kurtz described it as whether you're a recreational
13 organization. The precise language, which is important in this
14 context, is whether the employee was employed by an
15 establishment, which is an amusement or recreational
16 establishment.

17 And obviously one point to make out there is that it
18 doesn't just have to be recreation to qualify. It can also be
19 amusement. So the spectator sporting event would, in our view,
20 easily fall under amusement if, for some reason, it didn't fall
21 under recreation.

22 The other point I would add is the use of the term
23 "establishment," which is a term of art within the F.L.S.A.
24 And within the F.L.S.A. establishment refers to -- and I'm
25 quoting here from the regulations -- a "distinct physical place

1 of business rather than an entire business or enterprise, which
2 may include several separate places of business." And that's
3 29 CFR 77923.

4 And so our contention is this whole contention of this
5 whole argument that Mr. Kurtz made to you about the
6 organizational purposes is completely irrelevant here. The
7 regulations and the statute look at establishment and that is a
8 physical place of business. It's not the entire U.S.T.A. as an
9 entity.

10 In fact, Mr. Kurtz's authority and all the other
11 authority doesn't look at, you know, what other holdings a
12 company may have. What it looks at is what happens at this
13 particular location? So as Mr. Kurtz noted, the Minor League
14 Baseball team that operates the-- the worker that works at the
15 Minor League Baseball part is exempt. He noted both the
16 *Cincinnati Reds* case and the *New Orleans Hornets* case. And in
17 both of those cases, to my understanding, there's no dispute or
18 issue with respect to whether these were amusement or
19 recreational establishments when they held sporting events.
20 The issue was, could they meet the receipts tests given the
21 length of their operations?

22 Other examples that have been found --

23 THE COURT: Well, wait.

24 MR. OLESON: Sure.

25 THE COURT: One thing that I find a little puzzling,

1 just looking at the language that you're citing, is that the
2 exception provides that the overtime requirements don't apply
3 with respect to an employee employed by an establishment and
4 that the term "establishment" refers to a distinct physical
5 place of business.

6 Now, I don't know how the plaintiffs in this case are
7 employed, but if they're employed by the U.S.T.A. rather than
8 by Forest Hills Tennis-- I date myself by referring to Forest
9 Hills as opposed to whatever is the place now that the U.S.
10 Open is conducted at. If they are employed by the U.S.T.A., an
11 organization, it's a little hard to understand how such an
12 organization, which presumably has footprints in a lot of
13 different places, not just out in Queens, how you would satisfy
14 the language that's referred to here which sounds like, if
15 you're taking it literally -- that is, it's a place that you're
16 employed by, perhaps an amusement park which has been mentioned
17 here. Because if you're employed by an amusement park, there's
18 a place where the amusement park is. That's its location.
19 It's not an organization that happens to undertake or endorse
20 or promote activities here, there and everywhere.

21 So I'm a little bit puzzled, since you're putting much
22 emphasis on this definition here, how that helps you.

23 MR. OLESON: Well, I --

24 THE COURT: Again, we're not arguing a summary
25 judgment motion that hasn't been made, but since you're making

1 the point, I'm just a little bit puzzled by it.

2 MR. OLESON: Certainly, your Honor. The answer to
3 that is, again, what the regulations are talking about here is
4 they recognize that an enterprise -- and the enterprise is also
5 a term of art within the F.L.S.A -- an enterprise or business
6 organization can have many locations. And you can be employed
7 by that enterprise at a particular location and that's the
8 establishment you're employed at. So it talks here, again,
9 about these multi-unit locations.

10 THE COURT: So do the plaintiffs, the umpires,
11 whatever they are, work only at one place?

12 MR. OLESON: During the U.S. Open, which is the
13 subject of this lawsuit, they were only at the tennis grounds.

14 THE COURT: But that's not what the question is. If
15 they're employed by the U.S.T.A. and they work at a number of
16 different places, then it would be a stretch, I would think, to
17 say they're employed by the place, by Queens. They're paid
18 over a period of time. And I don't know what the form of
19 payment is or how that's done. But if they're paid over a
20 period of time for services rendered here, there and everywhere
21 by the U.S.T.A., I'm not sure that it is a comfortable fit to
22 say they are employed sometime in whatever-- whether it's
23 August or September, whenever this particular tournament takes
24 place -- by an establishment in Queens.

25 MR. OLESON: Right.

1 THE COURT: They're employed by the U.S.T.A. and they
2 go to different places to supervise these various sporting
3 events.

4 MR. OLESON: A couple points I'll make, your Honor.
5 First of all, some of these umpires may only work at the
6 U.S. Open. So obviously for them that issue would not be
7 there.

8 THE COURT: Yes.

9 I guess the second point is whether they're employed
10 by the U.S.T.A. obviously is also a point in dispute. If they
11 are, the regulations and the law do recognize the possibility
12 that you can be employed at one establishment, move to another
13 establishment, and there are certain rules about what happens
14 in those situations.

15 But, again, we're not --

16 THE COURT: But is there a dispute about whether
17 they're employed by the U.S.T.A.? That's what you seem to be
18 saying.

19 MR. OLESON: Well, we retain them as independent
20 contractors. And so--

21 THE COURT: Okay. I follow. But the relationship is
22 between them and the U.S.T.A., whatever the nature of the
23 relationship may be.

24 MR. OLESON: Correct, Judge.

25 THE COURT: Okay.

1 MR. OLESON: But I just wanted to make those points
2 clear on the law to the extent that is a relevant consideration
3 for the Court.

4 THE COURT: Sure.

5 MR. OLESON: The other legal point I wanted to make
6 was about this -- I guess we'll call it the mom-and-pop issue.
7 We cited in our papers, in our response, Court authority
8 pointing to the legislative history where there was a specific
9 rejection of a revenue ceiling on this exemption. In fact, the
10 statute and the regulations, neither of them contain any
11 revenue ceiling.

12 The statutory language is clear. We cite it at page 2
13 of our opposition. There's no reference in there to any
14 revenue hike. In fact, in those cases that Mr. Kurtz cites
15 with the New Orleans Hornets and Cincinnati Reds, there's no
16 arguments there about the fact that their revenue was too high
17 to satisfy the exemption. The question was whether the
18 receipts were concentrated enough to constitute two-thirds of
19 the receipts within the six-month period.

20 So I just wanted to make those two legal points. We
21 cited the case I think at-- about the legislative history on
22 this issue, footnote 3 on page 4, *Brock v. Louvers & Dampers,*
23 *Inc.*, 817 F.2d 1255.

24 THE COURT: By the way, again, I'm looking back at the
25 language that you both quote in your letter, and it says that

1 the exemption applies "if the employee is employed by an
2 establishment which is an amusement or recreational
3 establishment if, A, it"-- and I assume that means the
4 establishment-- "does not operate for more than seven months in
5 any calendar year; or, B, during the preceding calendar year,
6 its average receipts for any six months of such year were not
7 more than 33 and 1/3 percent of its average receipts for the
8 other six months of such year."

9 I take it that an argument is made, or will be made or
10 has been made, by the defendants that the seven-month rule is
11 to be applied in this case looking only at one tournament, or
12 is there some-- or is it conceded that, in fact, all the
13 tournaments that U.S.T.A. undertakes are squished into seven
14 months?

15 MR. OLESON: That's an either/or. So you can meet the
16 test either by operating for only seven months, or by having
17 your receipts concentrated, two-thirds of which would be
18 concentrated in a six-month period.

19 THE COURT: Right.

20 MR. OLESON: So in this case, your Honor, we are
21 arguing the receipts test. I think there could be an argument
22 made on the seven months. But for the reasons you suggest,
23 we're just going to, you know, push that one to the side.

24 THE COURT: Okay. And when you talk about the
25 receipts, is this receipts solely for this one tournament that

1 you're saying meet this 33 percent test or all the receipts by
2 U.S.T.A.?

3 MR. OLESON: What we've done, your Honor, our
4 contention would be it's just the term in itself. But what
5 we've done is actually provided plaintiffs with both the
6 receipts for the tournament, but also the receipts for the
7 entire U.S.T.A. Our position is that under both of those
8 standards -- either standard, we would meet the receipts test.

9 THE COURT: Okay. So --

10 MR. OLESON: The vast majority of the income from the
11 U.S.T.A. comes from the U.S. Open itself.

12 THE COURT: Is there additional revenue from
13 advertising of corporate sponsorship?

14 MR. OLESON: There are some-- there's pieces of that,
15 as well, and there are membership dues, as well, yes.

16 THE COURT: Television rights and that kind of thing?

17 MR. OLESON: Correct, your Honor.

18 THE COURT: Okay. And that's all added in when you do
19 your 33 percent calculation?

20 MR. OLESON: Correct, your Honor.

21 THE COURT: Okay.

22 MR. OLESON: I guess, going to the merits of
23 plaintiff's requests, the initial request for the board of
24 directors' contracts, as we've said in our papers and informed
25 plaintiffs, there are no actual contracts with the board of

1 directors, so we believe that issue is moot.

2 In their reply, for the first time, they said that we
3 should, in response to the request specifically for board of
4 directors' contracts, also produce the contract of the
5 executive director and of the chief of professional tennis. We
6 obviously did not have a chance to address that in writing, but
7 we see no relevance of that to these two statutory criteria
8 that we reference here. There's nothing, no case that we're
9 aware of, no regulation that we're aware of, nothing in the
10 statute that says somehow that the compensation of an
11 organization's chief executive officer is anywhere relevant to
12 these two statutory requirements.

13 THE COURT: Well, let me ask this: Contracts can
14 cover a number of different things. Usually they will cover
15 compensation, obviously. They will presumably also cover job
16 duties. Why wouldn't job duties potentially be relevant, at
17 least as a discovery matter, to the plaintiff's theory of
18 purpose as they interpret the exemption that's at issue here?

19 MR. OLESON: Sure. The first thing about that, your
20 Honor, is obviously, again, back to the statute and the
21 establishment, the character of the establishment, what goes on
22 at the U.S. Open is what determines whether it's recreational
23 use, the nature of what happens at that physical location.

24 THE COURT: Well, I take it you're arguing that the
25 only relevant activity is the U.S. Open.

1 MR. OLESON: Well, our--

2 THE COURT: And I'm a little bit puzzled by that,
3 putting aside whether if all the plaintiffs were only at the
4 U.S. Open, whether that's a viable argument. But where you've
5 got plaintiffs who do presumably other activities as well for
6 the U.S.T.A., I'm not sure that that's an obvious and
7 appropriate limitation on the scope of the analysis.

8 And what's particularly concerning then is it seems as
9 if you're, in a sense, arguing the summary judgment motion as a
10 means of limiting discovery. You'll have your theory about how
11 the exemption should be applied; plaintiffs will have their
12 theory. But until their theory is rejected, it would seem as
13 if their general type of inquiry is at least within the realm
14 of relevance.

15 MR. OLESON: A couple of things about that, your
16 Honor. First is that, you know, obviously the relevance of the
17 evidence is dictated by what the legal issues are.

18 THE COURT: Yes.

19 MR. OLESON: And the legal issue here, again, under
20 the statute, is the establishment, the character of the
21 establishment, and what happens there is what determines
22 whether it's recreational amusement. Again, they have cited no
23 case and no authority.

24 THE COURT: But the problem is, as I think I've sort
25 of at least raised with you, is that it's not at all clear,

1 certainly not clear beyond any question for purposes at least
2 of discovery, that your hypothesis about the universe of
3 relevant activity is viable given the way the exemption is
4 worded.

5 MR. OLESON: Well --

6 THE COURT: And that if you've got an organization
7 that engages in activities around the country, if not around
8 the world, and some of the plaintiffs are involved at least in
9 some of these various activities in various places, that you
10 can just say, well, the only thing that's relevant is what
11 happens out in Queens once a year.

12 MR. OLESON: A couple --

13 THE COURT: And if that's at least open to question,
14 not necessarily that it couldn't be decided on summary
15 judgment, but it's open to question until summary judgment is
16 decided, it's not clear to me why they shouldn't get discovery
17 pertinent to their theory which is, concededly, different from
18 your theory about how this exemption applies.

19 MR. OLESON: I understand, your Honor. First, I would
20 say it's not hypothetical. There is law. There is this
21 regulation that says this is an establishment base. I've
22 looked at one --

23 THE COURT: I've seen what the regulation says and to
24 me there's a question, at least, which will be litigated
25 undoubtedly, about how you apply that exemption to the facts of

1 this case. But it's not clear to me just from looking at the
2 exemption that that defines the scope -- that your theory about
3 how the exemption applies defines the scope of permissible
4 discovery.

5 MR. OLESON: I guess the other thing, your Honor, is
6 that, again, this idea of if they're at different locations,
7 does that change this analysis? And does that open the door
8 for the plaintiffs here? which is what I think you're
9 suggesting. There are rules and there's law about how you deal
10 with people who may be moving from one establishment to another
11 and how that may affect the analysis.

12 Plaintiffs obviously never raised that argument in
13 their response, so we'd be happy to provide you with
14 supplemental authority to explain how that happens. But,
15 again, nothing-- and I've looked at these before-- nothing that
16 I'm aware of within that analysis would look at, again, the
17 general purpose or much less the job duties of a chief
18 executive officer and how those are relevant. That's simply
19 not part of that equation, that legal equation.

20 THE COURT: Okay.

21 MR. OLESON: I guess the other kind of general
22 category that plaintiffs have referred to is the payroll data
23 for these individuals who work at the U.S. Open. And, again,
24 their theory on this is --

25 THE COURT: I'm sorry. This is the --

1 MR. OLESON: The questionable interrogatory or the --

2 THE COURT: -- question of whether U.S.T.A. pays

3 overtime and then to whom and, I guess, how much.

4 MR. OLESON: Correct.

5 THE COURT: Okay.

6 MR. OLESON: The first thing is, again, there's

7 nothing in the statute, nothing in the law, nothing in the

8 regulations that plaintiffs have pointed to that suggest that

9 this is in any way relevant to those two statutory

10 requirements. What are the receipts and what are the-- whether

11 this is a recreational use. There's just no way, in my mind,

12 to connect whether somebody else is being paid overtime to

13 those two statutory issues.

14 The other point, I guess, your Honor, is that if

15 plaintiff's theory is that somehow the fact that we paid

16 overtime to these individuals is relevant, they have that

17 information. It's certainly duplicative and overly burdensome

18 for us to have to provide every single detail of who was paid,

19 how much, when and where. That has absolutely no relevance to

20 that argument.

21 THE COURT: Okay. Let's put aside for the moment

22 whether it has relevance and let's talk about burden, because

23 you're, I think, putting a couple of different things on the

24 table.

25 MR. OLESON: Sure.

1 THE COURT: What exactly is the burden?

2 MR. OLESON: We asked the people at the U.S.T.A. to go
3 find who was paid overtime, how much, when. The response we
4 got is that we would have to retain somebody additional. It
5 would probably take a month or two. We would have to go
6 through a number of paper documents that are in bankers' boxes
7 filed away to obtain that information. And this goes both, I
8 think, to their document request and to the interrogatory
9 itself.

10 THE COURT: There is a separate request for these
11 documents?

12 MR. OLESON: Yes, your Honor. It would be document
13 request numbers 10 and 19, I believe.

14 THE COURT: Okay. I think they did not ask for this
15 today.

16 MR. OLESON: Okay.

17 THE COURT: They just said if you could enforce
18 interrogatory number 1, that would be sufficient.

19 MR. OLESON: But the interrogatory itself does ask for
20 all this minute detail about who was paid, how much and when,
21 and whether they worked overtime.

22 THE COURT: Okay.

23 MR. OLESON: I believe I've addressed the issues that
24 have been raised today with your Honor. If there are other
25 issues that you'd like me to...

1 THE COURT: Well, there was a reference to minutes.
2 I'm not sure, is that being contested?

3 MR. OLESON: For the same reasons as the board of
4 directors' compensation or contracts, again, what may be
5 discussed, what they may choose to write down at these meetings
6 and on-line, you know, these general meetings of the U.S.T.A.,
7 organizing other activities wholly unrelated to the U.S. Open,
8 in our mind is irrelevant for the reasons we stated on the
9 other issues.

10 THE COURT: All right. Anything else?

11 MR. OLESON: Not unless you have something, your
12 Honor.

13 THE COURT: Okay.

14 MR. KURTZ: Judge, just to address a couple of
15 contentions, your Honor. The idea that the U.S. Open might be
16 a separate establishment from the U.S.T.A., the contract that
17 plaintiffs signed are with the U.S.T.A. And the U.S. Open is
18 not a defendant in this case, so I just wanted to dispose of
19 that.

20 And the same thing for the board of directors'
21 minutes. The fact that they're talking about something other
22 than the U.S. Open, it's whether the U.S.T.A., the employer, is
23 an exempt recreational establishment.

24 That's all I have for now. Thank you.

25 THE COURT: I take it one of the arguments you're

1 going to be making, if you haven't already made it, is that the
2 U.S.T.A. is not an establishment as defined here because it's
3 not a distinct physical place of business?

4 MR. KURTZ: No, that is not an argument that we have
5 made.

6 THE COURT: Okay.

7 MR. OLESON: Your Honor, if I may.

8 THE COURT: Yes, sure.

9 MR. OLESON: On both the issue Mr. Kurtz raised and
10 the issue you raised.

11 THE COURT: Yes.

12 MR. OLESON: It's perfectly acceptable for an employer
13 to lease a premises, hold an event there, and that be
14 considered the establishment. The example is, for instance,
15 the Texas State Fair. The fairgrounds are not owned by the
16 state. The state authority may lease the fairgrounds and hold
17 an event there once a year, those individuals. That's the
18 relevant establishment, the Texas Fair State.

19 THE COURT: Okay. Let me go through this item by
20 item, but first I will note that, indicated during the course
21 of our colloquy, that while the defendant's assessment of how
22 the cited exemption will apply in this case may be correct, it
23 is not so conclusively correct as effectively to deprive the
24 plaintiffs of the right to pursue discovery relevant to their
25 theory of how the exemption should be applied.

1 Accordingly, the following is to be provided: The
2 minutes of the board meetings, the minutes of the past
3 presidents meetings, the U.S.T.A.'s application for
4 not-for-profit status.

5 With respect to interrogatory 1, that is the inquiry
6 about the payment of overtime, the defendant will be permitted,
7 if it wishes, to make an evidentiary showing of burden. That
8 showing is also to address the potential for narrowing the
9 scope of the request down, for example, to a listing of the
10 categories of employees of U.S.T.A. who are paid overtime as
11 distinguished from listing every single such employee and how
12 much each such employee was paid, which frankly seems to me
13 probably, if it's at all significantly burdensome, more of a
14 stretch and perhaps less justifiable than the somewhat more
15 fulsome description in the policy under which, in effect,
16 U.S.T.A. pays apparently some folks overtime and doesn't pay
17 others.

18 Also, that whole question of why U.S.T.A. pays some
19 people overtime and what the distinguishing characteristics are
20 is a matter that presumably could be addressed as well in
21 deposition if the plaintiffs were interested in doing so.

22 Let me just consult my notes for a moment.

23 I'm not inclined at this point to order production of
24 the contracts of executive directors and so I am not going to
25 enforce that now. That's without prejudice if at some point

1 down the road there's a more compelling explanation of why
2 those are needed for purposes of analyzing the exemption at
3 issue.

4 Are there any other questions that we should deal with
5 at this point?

6 MR. OLESON: Your Honor, may I just ask a point of
7 clarification?

8 THE COURT: Yes.

9 MR. OLESON: You're not ordering at this time that a
10 deposition would be proper as to the reasoning between whether
11 some people are paid overtime and others are not?

12 THE COURT: I'm simply saying that the plaintiffs are
13 free to pursue a deposition if they want.

14 MR. OLESON: Okay. Because we do have-- our
15 understanding is that this phase of discovery is closed. It
16 would be past the deadline. I just want to make sure that we
17 have an opportunity to make de novo arguments at some point if
18 that issue is raised by them. I don't know if they will raise
19 it.

20 THE COURT: We will see.

21 MR. OLESON: Okay.

22 THE COURT: But in any event, the only other question
23 now is if you're intent upon making a burden argument, and
24 we're now at Tuesday, how long would it take you to put in
25 whatever you have to put in?

1 MR. OLESON: I think the first step would be for us to
2 confer with plaintiffs and see if we can narrow it pursuant to
3 your suggestion. If that fails, I guess -- the only thing that
4 gives me pause is the holidays. I'm not sure who's still
5 around to make that statement. My request would be three days
6 after the New Year or whatever. But if that's too long for
7 your Honor, I can explore something else.

8 THE COURT: No, that's fine. That would take us to
9 the end of-- I guess the first week of January would be the
10 4th?

11 MR. OLESON: I think that's correct, Judge.

12 THE COURT: Why don't we target that as the date if
13 you need to make any such submissions.

14 MR. OLESON: Thank you, your Honor.

15 THE COURT: Anything else on plaintiffs' agenda?

16 MR. KURTZ: Nothing further, your Honor. Just to
17 avoid silence, we haven't said anything about a deposition, but
18 we reserve the option until we see the documents we're getting.

19 THE COURT: Okay.

20 MR. OLESON: Nothing further, your Honor.

21 THE COURT: And I take it from what has been said,
22 you've done the discovery on the individual plaintiffs; you've
23 done the class cert discovery. There still remains the
24 potential for additional discovery, assuming the case goes
25 forward past the class cert. Is that correct?

1 MR. OLESON: That's correct, your Honor. The initial
2 case management order had a phased discovery process where we
3 went through these initial phases first.

4 THE COURT: Thank you.

5 MR. OLESON: Thank you, your Honor.

6 THE COURT: Have a good holiday.

7 MR. KURTZ: Thank you. You, too.

8 MR. OLESON: Thank you.

9 (Adjourned)